

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

DAVID MARQUETTE GREEN,

Petitioner,

v.

ACTION NO. 2:23cv405

HAROLD W. CLARKE,
Director of the Virginia
Department of Corrections,

Respondent.

**UNITED STATES MAGISTRATE JUDGE’S
REPORT AND RECOMMENDATION**

Petitioner David Marquette Green (“Green”), a Virginia inmate proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254¹ on August 16, 2023. ECF No. 1. Green challenges his conviction in the Circuit Court for Lancaster County in November 2022, for possession of a weapon by a violent felon. *Id.* at 1–2. This matter was referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Civil Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia. For the following reasons, the Court **RECOMMENDS** that Green’s petition be **DISMISSED WITHOUT PREJUDICE** to allow Green to proceed with his claims in state court and sign the petition.

¹ Green mistakenly used the form for a petition pursuant to 28 U.S.C. § 2241. *See* ECF No. 1. Green is a state prisoner challenging his conviction and sentence in state court. Accordingly, his petition is treated as one brought pursuant to 28 U.S.C. § 2254.

Green indicates in his petition that the direct appeal of his conviction is currently pending in the Court of Appeals of Virginia. *Id.* at 2. On September 13, 2023, Green was notified that this Court cannot address his petition until after the Supreme Court of Virginia has ruled on the claims. ECF No. 4, at 2 (citing 28 U.S.C. § 2254(b)(1)(A)). Green was directed to show cause why the petition should not be dismissed, pursuant to 28 U.S.C. § 2254(b), without prejudice to Green completing the review process in state court. *Id.* (citing *Strader v. Allsbrook*, 656 F.2d 67, 67–68 (4th Cir. 1981); *Picard v. Connor*, 404 U.S. 270, 275 (1971)). In addition, the Court ordered Green to sign his petition. *Id.* at 1–2. The Court warned Green that if he failed to comply with the order within 30 days, the matter would be submitted to a United States District Judge for dismissal without prejudice. *Id.*

Green has not responded to the order, and the time to respond has expired. According to the record before the Court, Green has not exhausted his claims before the Supreme Court of Virginia or signed his petition. It is therefore **RECOMMENDED** that Green’s federal petition be **DISMISSED WITHOUT PREJUDICE** to Green refiling his federal petition after he has proceeded in the Virginia state courts, *see Slayton v. Smith*, 404 U.S. 53, 54 (1971), and signed any petition filed with the Court.

REVIEW PROCEDURE


By copy of this report and recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within fourteen (14) days from the date this report is forwarded to the objecting party by Notice of Electronic Filing or mail, *see* 28 U.S.C. § 636(b)(1), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. Rule 6(d) of

the Federal Rules of Civil Procedure permits an extra three (3) days, if service occurs by mail. A party may respond to any other party's objections within fourteen (14) days after being served with a copy thereof. *See* Fed. R. Civ. P. 72(b)(2) (also computed pursuant to Rule 6(a) and (d) of the Federal Rules of Civil Procedure).

2. A district judge shall make a *de novo* determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in a waiver of appeal from a judgment of this Court based on such findings and recommendations. *Thomas v. Arn*, 474 U.S. 140 (1985); *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).



Robert J. Krask
United States Magistrate Judge

Norfolk, Virginia
November 9, 2023

Clerk's Mailing Certificate

A copy of the foregoing was provided electronically to counsel for respondent and was mailed this date to:

David Marquette Green, #1142314
VA DOC Centralized Mail Distribution Center
3521 Woods Way
State Farm, VA 23160

Fernando Galindo, Clerk

By E. Price
Deputy Clerk

November 9, 2023